

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

<p>STATE OF OKLAHOMA,</p> <p style="text-align: center;">Plaintiff,</p> <p>v.</p> <p>TYSON FOODS, INC., et al.,</p> <p style="text-align: center;">Defendants.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Case No. 05-cv-329-GKF(SAJ)</p>
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**STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO MOTION
OF THE NATIONAL CHICKEN COUNCIL, U.S. POULTRY & EGG ASSOCIATION,
AND THE NATIONAL TURKEY FEDERATION FOR PERMISSION TO FILE BRIEF
AS *AMICI CURIAE* IN OPPOSITION TO THE PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**

Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma ("the State"), hereby submits this response in opposition to the Motion of the National Chicken Council ("NCC"), U.S. Poultry & Egg Association, and the National Turkey Federation ("NCC Movants") for Permission to File Brief as *Amici Curiae* in Opposition to the Plaintiff's Motion for Preliminary Injunction [DKT #1542] ("*Amicus* Motion"). Because the *Amicus* Motion is "not timely, useful or helpful to the Court beyond the help the lawyers for the parties are able to provide," the *Amicus* Motion must be denied.

I. The NCC Movants' *Amicus* Motion must be denied because it is not timely, useful or helpful to the Court beyond the help the lawyers for the parties are able to provide.

A. Governing legal principles

The principles governing the grant to participate as *amicus curiae* are well-settled. "There is no inherent right to file an *amicus curiae* brief with the Court. It is left entirely to the discretion of the Court." *Long v. Coast Resorts, Inc.*, 49 F. Supp. 2d 1177, 1178 (D. Nev. 1999);

Fluor Corp. & Affiliates v. United States, 35 Fed. Cl. 284, 285 (1996); *Waste Management of Pennsylvania, Inc. v. City of York*, 162 F.R.D. 34, 36 (M.D. Pa. 1995). "A court may grant leave to appear *amicus curiae* if it deems the proffered information timely and useful." *Hawksbill Sea Turtle v. FEMA*, 11 F. Supp. 2d 529, 541 (D.V.I. 1998), quoting *Liberty Lincoln Mercury v. Ford Marketing Corp.*, 149 F.R.D. 65, 82 (D.N.J. 1993).

As this Court recently stated in *JPMorgan Chase Bank, N.A. v. Fletcher*, 2008 WL 73233, *1 (N.D. Okla. Jan. 7, 2008):

An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide *Otherwise, leave to file an amicus curiae brief should be denied.* . . .

(Emphasis added; citation omitted.)

Furthermore, unnecessary *amicus* submissions have been criticized as imposing a "real burden on the court system," "impos[ing] a burden of study and the preparation of a possible response on the parties," "more often than not sponsored or encouraged by one or more of the parties," possibly "intended to circumvent the page limitations on the parties' briefs," and "attempts to inject interest-group politics into the federal appellate process by flaunting the interest of a trade association or other interest group in the outcome." *National Organization for Women, Inc. v. Scheidler*, 223 F.3d 615, 616-17 (7th Cir. 2000).

As discussed below, the NCC Movants' *Amicus* Motion contravenes these principles in at least two ways: it is neither timely nor useful to the Court.

B. The *Amicus* Motion is untimely

The Preliminary Injunction Motion has been on file for approximately three months now. The *Amicus* Motion should be denied as untimely because it has been filed at the eleventh hour --

a mere four days before the scheduled start of the preliminary injunction proceeding. It has offered no explanation for its delay in filing its *Amicus* Motion. To require the State to expend resources responding to an *amicus* brief as it makes its final preparations for the preliminary injunction hearing is an unnecessary distraction, improper, and prejudicial.

C. The *Amicus* Motion is not useful or helpful to the Court beyond the help the lawyers for the parties are able to provide

As stated above, the NCC Movants raise a flawed legal argument that Defendants correctly chose not to make.¹ As this Court recently stated in *JPMorgan Chase*, 2008 WL 73233, "[a]micus briefs filed by allies of litigants which duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief, are an abuse and should not be allowed. . . . The term 'amicus curiae' means friend of the court, not friend of a party." *Id.* at *1 (denying motion to file *amicus* brief because it would otherwise "place the proposed amicus in the position of an additional counsel for the defendant rather than a friend of the Court"). This Court went on to deny the *amicus* motion in *JPMorgan Chase* because

it does not appear that the proposed amicus possesses unique information or perspective that can help the Court beyond the help that the lawyers for the parties are able to provide. [Defendant] is represented in this case by exceptional lawyers. Current counsel are fully capable of presenting the law and the facts to assist the Court in resolving the issues presented.

¹ The NCC Movants have based their *Amicus* Motion on the argument that the State's RCRA claim is precluded because federally-permitted Concentrated Animal Feeding Operations are subject to the CWA and thus excluded from RCRA. The NCC Movants argument is flawed in at least two respects. First, NCC Movants have not identified any federally-permitted Concentrated Animal Feeding Operations in the Illinois River Watershed. And second, even were there federally-permitted Concentrated Animal Feeding Operations in the Illinois River Watershed, the CWA does not exclude the State's RCRA claim. *See* 42 U.S.C. § 6905(a) ("Nothing in this chapter shall be construed to apply to (or to authorize any State, interstate, or local authority to regulate) any activity or substance which is subject to the Federal Water Pollution Control Act . . . except to the extent that such application (or regulation) is not inconsistent with the requirements of such Acts"). The State's RCRA claim, were there a federally-permitted Concentrated Animal Feeding Operations in the Illinois River Watershed, would not be inconsistent with the requirements of the CWA.

Id. at *2. So too, here. Other than making an additional argument that a new set of counsel have crafted, the NCC Movants' proposed *amicus* brief does not contain "unique information or perspective that can help the Court beyond the help that the lawyers for the parties are able to provide."

In short, for lack of utility, the NCC Movants must, therefore, be denied permission to file their proposed *amicus* brief. See *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 282 F. Supp. 2d 1271, 1274 (D.N.M. 2002) (denying leave to file *amicus* brief for lack of utility); *Long*, 49 F. Supp. 2d at 1177-78 (same); *Hawksbill Sea Turtle*, 11 F. Supp. 2d at 541 (denying leave because proposed *amicus* submission "lack[ed] utility since it does not directly address the facts or law at issue in this case").

II. Conclusion

For the foregoing reasons, the Motion of the National Chicken Council, U.S. Poultry & Egg Association, and the National Turkey Federation for Permission to File Brief as *Amici Curiae* [DKT #1542] should be denied.

Respectfully Submitted,

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